



IN THE

Supreme Court of the United States

October Term, 1977

No. 77-183

ASPHALT MATERIALS, INCORPORATED,
CHARLES HALL, President,
Petitioner,

vs.

UNITED STATES OF AMERICA and
DENNIS J. HERZOG, Special Agent,
Internal Revenue Service,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Asphalt Materials, Incorporated, Charles Hall,
President, respectfully prays that a Writ of Certiorari issue to
review the judgment of the United States Court of Appeals for
the Second Circuit in the above-entitled case.

Opinions Below

The Court of Appeals wrote no opinion. The opinion of the
District Court for the Western District of New York is re-
printed in Appendix "C", p. 7a, *infra*.

Jurisdiction

The Judgment of the Court of Appeals was entered on May 4, 1977, and is reprinted in Appendix "B", p. 5a, *infra*.

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1). The basis of jurisdiction of the District Court was Title 26, U.S.C. §§ 7402(b) and 7604(a).

Questions Presented

Two substantial and paramount issues are involved in this case:

1. Were the Government's moving papers to compel compliance with the IRS summons of April 8, 1976, sufficient under the provisions of § 7602 of the Internal Revenue Code where there was no showing that the records sought to be examined were relevant or material to the IRS inquiry and where the Special Agent failed to follow the provisions of the Handbook for Special Agents, § 267.2(1) and (5).

2. Was a civil summons, issued pursuant to the provisions of the Internal Revenue Code, issued in bad faith and with prosecutorial intent particularly where an admission to that effect was made by the Assistant Federal Attorney who acted as counsel to the IRS on the motion to compel compliance.

Statute and Handbook Involved

The Federal Statute involved in this case is Title 26 U.S.C. § 7602 and the "Handbook for Special Agents," § 267.2(1) and (5).

Statement of Facts

On March 12, 1976, Dennis J. Herzog, Special Agent, Internal Revenue Service, served a summons on Petitioner, Charles Hall, as President of Asphalt Material Corp., calling for the production before the special agent of "all corporate records including, but not limited to, sales journal, cash receipts book, cash disbursements book, cancelled checks and bank statements, corporate income statements, corporate financial statements, and copies of tax returns. The above records are requested for the years 1967 through and including 1974." Thereafter, on April 8, 1976, the Special Agent served a second summons on petitioner. A copy is reprinted in Appendix "D", p. 10a, *infra*.

Petitioner declined to comply and on October 22, 1976, petitioner was served with an order to show cause returnable in the United States District Court for the Western District of New York on a petition to enforce the second summons. A copy is reprinted in Appendix "E", p. 14a, *infra*. This matter came on to be heard by Honorable John T. Elfvin on November 1, 1976. By memorandum and order dated November 19, 1976, Judge Elfvin ordered compliance with the summons of April 8, 1976 (Appendix "C", p. 7a, *infra*). A notice of appeal to the United States Court of Appeals for the Second Circuit was filed on December 20, 1976, and the judgment of the District Court was affirmed without opinion on May 4, 1977 (Appendix "B", p. 5a, *infra*).

REASONS FOR GRANTING THE WRIT

I. As to the failure of the Government to demonstrate that in issuing the IRS summons the records sought were relevant or material to its investigation.

Pursuant to the provisions of § 7602 of the Internal Revenue Code, which is the authority under which the IRS summons herein concerned was issued, the IRS is authorized to examine any books, papers, records or other data which may be *relevant or material* to certain types of inquiries. This requirement that the documents sought to be examined must be relevant or material is found in each of the three subdivisions of § 7602. The threefold reference in this concise statutory section is either meaningful or meaningless.

The Government has chosen in this case to treat the statutory requirement as being meaningless because in their moving papers reprinted in Appendix "E" p. 14a, *infra*, there is not one iota of factual information to bolster this application or to evidence that the records sought are in fact relevant or material but it seems to rely on the fact that since they asked for every conceivable record a business could have they *must* be relevant or material. It is respectfully submitted that this is not such a demonstration or proof of relevancy or materiality, as the statute requires.

However, on the other side of the coin, it is likewise the Government who has demonstrated that the term "relevant or material" is meaningful. The "Handbook for Special Agents", § 267.2(1) and (5) warns special agents in enforcement proceedings of the code requirement of relevancy of materiality and also warns that "a reasonable basis for making the inquiry must exist." A copy is reprinted in Appendix "F" p. 20a, *infra*.

Speaking to the subject of supporting affidavits in an enforcement proceeding, the Handbook states the following in § 268.3(1):

"To support applications for Court orders directing compliance with a summons, the agent may be requested by the United States Attorney to prepare an affidavit . . . reciting *detailed* information concerning the nature and purpose of the examination, the testimony and records desired and their relevancy to the examination" (Emphasis supplied).

The Government has failed completely to disclose why the testimony and documents are "relevant or material." Thus the lower Courts had no basis on which to make a determination that the records sought were relevant or material. The matter was decided on the basis of papers submitted and oral argument only. No hearing was ordered.

II. As to the IRS issuance of the summons in bad faith and with prosecutorial intent.

It is clear in this case that a civil summons was issued in bad faith. At the oral argument, the United States Attorney made it clear in no uncertain terms that the summons was issued for an improper purpose. He said that the records and testimony "are relevant *obviously* to a criminal investigation against Mr. Hall and/or the corporation" (Emphasis added). See Appendix "G" p. 22a, *infra*. Again, at another point, "there could hardly be any more relevant and material inquiry *when you seek to build a criminal tax case* against a president of a company." Appendix "G" p. 22a, *infra*.

The question of purpose or motivation behind the issuance of an IRS summons has been recently reviewed in the case of *United States v. Wright Motor Company, Inc.*, 536 F.2d 1090

(C.A. 5 1976). In that case, as in this, a summons was issued to the president of a company and to the company for the purpose of investigating his personal tax liability. He declined to appear and declined to produce the corporate records. In the subsequent enforcement proceedings, the issue of the Government's motivation was raised. The Court ordered the deposition of the Government Special Agent and the Government appealed when the Special Agent was ordered to answer questions about a criminal investigation of the taxpayer. The Special Agent refused to answer the questions.

In its opinion, the Court reviewed the law where the issue of motivation in issuing the IRS summons has come up and discusses their earlier decision in *United States v. Roundtree*, 420 F.2d 845 (C.A. 5 1969) where they had reversed a District Court's enforcement of an IRS summons because the District Court had refused to allow a taxpayer to discover, on deposition, whether the sole purpose of the summons was to further a criminal prosecution. The Court points out the importance of allowing the taxpayer his opportunity to explore the question of Government motivation when it states at p. 1095 of its opinion:

"Although we believe that the government is correct in its contention that a valid civil purpose for an investigation is sufficient to allow the enforcement of a summons, *United States v. Moore*, 485 F.2d 1165 (5th Cir. 1973), we do not believe that discovery should be denied upon the government's bare assertion of its existence because a "summonee must be afforded at least *some* opportunity to substantiate its allegations." *United States v. Church of Scientology*, 520 F.2d 818, 824 (9th Cir. 1975) (italics in original)." Accordingly, we hold that the district court did not err in ordering the special agent to answer questions inquiring whether the summons was issued solely for a criminal prosecution of taxpayer."

While the District Court in this case alluded to the Government's concession as being one that the investigation might lead to criminal prosecution, the record disclosed that the Government statement was much stronger and a clear cut declaration that this was a *criminal tax case against him*.

Under such circumstances due to the paucity of facts to substantiate the application for enforcement in the first place and the admission that the Government is attempting to use a civil procedure to conduct a criminal investigation the application for the enforcement of the summons should have been denied and the application dismissed.

While there is no indication that the Justice Department or Regional Counsel had recommended prosecution lack of such a recommendation does not preclude an inquiry as to whether a summons was issued for an improper purpose.

In *Donaldson v. United States*, 400 U.S. 517 (1971) the Supreme Court held that under § 7602 an Internal Revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.

A question has arisen since the *Donaldson* case as to whether the standard set forth in that decision can be interpreted in such a way that the "good faith" requirement is merged into the recommendation for criminal prosecution requirement and then the recommendation requirement be strictly interpreted to mean a specific recommendation made at the conclusion of an investigation when a matter is turned over to the Department of Justice.

The more rational view of the *Donaldson* decision is represented by the decisions in *United States v. Wall Corporation*, 475 F.2d 893, 895 (C.A.D.C. 1972); *United States v.*

McCarthy, 514 F.2d 368, 373 (C.A.3 1975) and *United States v. Lafko*, 520 F.2d 622, 625 (C.A.3 1975).

These cases point out the fact that the *Donaldson* standard is a two-fold inquiry—each separate from the other—as to whether the proceeding has been conducted in good faith and that the “recommendation” need not be a formal specific recommendation made after an investigation that prosecution be commenced but rather if an agent had formed a firm purpose to recommend criminal prosecution then that is sufficient to taint the issuance of the summons.

“Thus if it can be shown that the investigating agent had already formed a firm purpose to recommend criminal prosecution even though he had not as yet made a formal recommendation, issuance of the summons would presumably be in bad faith.” *United States v. Wall Corporation*, *supra*.

“A preceding Justice Department recommendation to prosecute is not the *sine qua non* for proving that an Internal Revenue summons was issued for an improper purpose.” *United States v. Lafko*, *supra*.

In the present case, the only way to determine if the special agent had formed a firm purpose to recommend prosecution would be to hold a hearing and require testimony of the special agent.

The basis of the Petitioner’s application for a Writ is to urge this Court to examine the decision below in relation to the holding in the *Donaldson* case and those line of cases represented by the *Lafko* and *Wall* decisions as it relates to the facts in this particular case to end that the *Donaldson* doctrine be recognized as requiring that in a summons enforcement proceeding the Government be required to show that it is proceeding in good faith and that an examination of the

special agent be ordered to determine if a firm purpose to recommend prosecution has been formed prior to the issuance of the summons. It is important to determine whether the *Donaldson* standard requiring inquiry as to recommendation to prosecute will be given a strict and narrow interpretation requiring a formal determination by the government to that effect and thus freedom to use the summons device until that time, or whether a fact hearing will be allowed to determine whether there is an intent to prosecute even though this may not have been reduced to a formal recommendation to that effect. It seems evident that under the strict view the government will be encouraged to mask its true intent until such time as it has made full use of that summons power and only then make its formal recommendation and its true intentions known.

Applying the foregoing analysis in the present case we are faced with a situation where the Government’s attorney has conceded on the return of the enforcement motion that the Government is attempting to use a civil summons to conduct a criminal investigation and then resisting any inquiry into its motives on the basis that a formal recommendation to prosecute has not as yet been made. It is this very type of situation to which *Wall* and *Lafko* speaks. In a case of this nature a hearing should be conducted to probe the question of prosecutorial intent.

The Court has indicated since *Donaldson* that the petitioner’s position is valid. In *United States v. Bisceglia*, 420 U.S. 141, 152 (1975) it was made clear that while the IRS has statutory authority to issue a “John Doe” summons to a bank to discover the identity of a person who has had bank transactions “[W]e do not decide that a ‘John Doe’ summons is always enforceable when the name of the individual is lacking

and the Service's purpose is *other than investigative*" (emphasis supplied). Petitioner's position is further buttressed by the earlier decision in *United States v. Powell*, 379 U.S. 48, 58 (1964) when the Court stated:

"This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered. At the hearing he 'may challenge the summons on any appropriate ground', *Reisman v. Caplin*, 375 U.S. 440 at 449, 11 L.ed.2d 459 at 466, 84 S. Ct. 508. Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused."

Conclusion

For the reasons stated herein, the Petition for Certiorari should be granted.

Respectfully submitted,

ALBRECHT, MAGUIRE, HEFFERN
& GREGG, P.C.,
Attorneys for Petitioner.

July 29, 1977.

Of Counsel:

Charles H. Dougherty,
Buffalo, New York.

APPENDIX "A"

Statutory Provisions

§ 7402. *Jurisdiction of district courts*

(a) *To issue orders, processes, and judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) *To enforce summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(c) *For damages to United States officers or employees.*—Any officer or employee of the United States acting under authority of this title, or any person acting under or by authority of any such officer or employee, receiving any injury to his person or property in the discharge of his duty shall be entitled to maintain an action for damages therefor, in the district court of the United States in the district wherein the party doing the injury may reside or shall be found.

(d) *Action on bonds.*—The United States district courts, concurrently with the courts of the several States, shall have

Appendix "A"—Statutory Provisions.

jurisdiction of any action brought on the official bond of any internal revenue officer or employee required to give bond under regulations promulgated by authority of section 7803.

(e) *To quiet title.*—The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.

§ 7604. *Enforcement of summons*

(a) *Jurisdiction of district court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the

Appendix "A"—Statutory Provisions.

judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

§ 7602. *Examination of books and witnesses*

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Appendix "A"—Statutory Provisions.

§ 1254. *Courts of appeals; certiorari; appeal; certified questions*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX—"B"

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

For the Second Circuit

Received
May 12 1977

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of May one thousand nine hundred and seventy-seven.

Present: Hon. Walter R. Mansfield,
Hon. William H. Timbers, *Circuit Judges.*
Hon. Lloyd F. MacMahon, *District Judge.*

UNITED STATES OF AMERICA and DENNIS
J. HERZOG, Special Agent, Internal
Revenue Service,

Petitioners-Appellees,

v.

ASPHALT MATERIALS, INCORPORATED,
CHARLES HALL, President,
Respondents-Appellants.

77-6003

Appeal from the United States District Court for the
Western District of New York.

Appendix "B"—Judgment of the Court of Appeals.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk,

By: ARTHUR HELLER,
Arthur Heller.

APPENDIX "C"
Opinion of District Court

UNITED STATES DISTRICT COURT
Western District of New York

UNITED STATES OF AMERICA and DENNIS
J. HERZOG, Special Agent, Internal
Revenue Service,

Plaintiff,

vs.

ASPHALT MATERIALS, INCORPORATED,
CHARLES HALL, President,

Defendants.

Misc. Civ. 76-87

The Internal Revenue Service ("IRS") petitions this Court for judicial enforcement of an IRS summons issued pursuant to Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602, which authorizes the examination of books and records in order to determine the civil tax liability of any person. Defendants, a corporation and its president, failed to comply with such summons and this Court issued an Order to Show Cause on October 14, 1976. Argument by counsel was heard on November 1, 1976.

In addition to the summons in question issued by the IRS on April 8, 1976, a previous summons was served on March 12, 1976. The later-issued summons apparently was served to overcome the lack of specificity of the items requested to be

Appendix "C"—Opinion of District Court.

examined in the initial summons. Defendants, however, do not assert bad faith or harassment in this second effort, but attempt only to use the first summons to emphasize the alleged overbreadth of the summons now sought to be enforced.

The defendants first contend that the present enforcement petition does not explicitly allege that the material sought to be examined is "relevant" to an investigation into defendants' civil tax liability. Defendants miss the point. Relevancy is determined by reading the summons itself in light of the purpose and extent of the tax investigation, not by reference to its precise assertion in an enforcement petition. An examination of the summons reveals that the items to be produced are highly relevant to the presently-contemplated civil investigation and are sufficiently delineated and circumscribed to satisfy the standards of Section 7602. See, *United States v. Giordano*, 419 F.2d 564, 569 (8th Cir. 1969).

Defendants next contend that the purported civil investigation may eventually result in criminal prosecution and this possibility invalidates the instant summons. It is true that Section 7602 only authorizes the issuance of a summons to facilitate a civil investigation. It is well established, however, that such a summons is valid "if it is issued in good faith and prior to a recommendation for criminal prosecution." *Donaldson v. United States*, 400 U.S. 517, 536 (1971). See also, *Black v. United States*, 534 F.2d 524 (2d Cir. 1976). A Section 7602 summons is invalid and its enforcement properly denied only when the sole purpose of the investigation is to gather evidence for use in a criminal prosecution. *Donaldson, supra* at 533.

If (1) a recommendation for criminal prosecution has not yet been made, (2) the agent conducting the investigation has

Appendix "C"—Opinion of District Court.

not already decided to recommend prosecution, (3) the summons is not being used to harass the taxpayer, and (4) the IRS has not already inspected the books and records listed in the summons, the mere fact that criminal as well as civil liability may follow does not invalidate the summons and it may be judicially enforced. *United States v. Friedman*, 532 F.2d 928, 932 (3d Cir. 1976).

In the instant case, no recommendation for criminal prosecution has been made, no harassment has been alleged, and the IRS has not yet inspected the books and records to be produced. No evidence has been presented to show that the investigating agent has "already formed a firm purpose to recommend prosecution." See, *Friedman, supra* at 932. Furthermore, defendants have not affirmatively shown that the sole purpose of the investigation is aimed at criminal prosecution of the taxpayer. While the government concedes that the present civil investigation may eventually lead to criminal prosecution, the mere possibility of criminal liability is not enough to invalidate the instant summons. The likelihood of a criminal prosecution does not bar enforcement of a Section 7602 summons so long as a good faith civil investigation of the taxpayer is being conducted.

Therefore, it is

ORDERED that defendants comply with the Internal Revenue Service summons served upon them on April 8, 1976.

Dated: Buffalo, N.Y.,
November 19, 1976.

s/ JOHN T. ELFVIN, U.S.D.J.

APPENDIX "D"**IRS Summons**

James H. (Illegible)
 Department of the Treasury
 Internal Revenue Service

In the matter of the tax liability of
 Charles Hall
 192 Whitfield Ave.
 Buffalo, NY 14220

Internal Revenue District of Buffalo, NY

Period(s) 1972 through 1974

The Commissioner of Internal Revenue

To Charles Hall, as president of Asphalt Materials Corp.

At 141 Fillmore Avenue, Buffalo, New York

Greetings:

You are hereby summoned and required to appear before Dennis J. Herzog an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

1. Records of all corporate sales whether denominated "sales journals" or by any other name;
2. Records of all corporate cash receipts whether denominated "cash receipts journals" or by any other name;

Appendix "D"—IRS Summons.

3. Records of corporate disbursements whether denominated "cash disbursements journals" or by any other name;

4. All bank statements and cancelled checks in the name Asphalt Materials Corp., Inc., or any variation of the corporate name, which reflect transactions of checking account with Manufacturers & Traders Trust Co. for the calendar years 1967 through 1974 and any and all other corporate checking accounts;

5. Profit and loss statements whether denominated as such or by any other name;

6. Balance sheets whether denominated as such or by any other name;

7. Retained copies of all Forms 1120 filed by Asphalt Materials Corp., Inc., whether filed in such name or any variation thereof;

8. Retained copies of all Forms 941 and 940 filed by Asphalt Materials Corp., Inc., whether filed in such name or any variation thereof.

9. Records requested in Items 1 through 8 above for periods 1967 through 1974.

Place and time for appearance:
 at Intelligence Division, Rm. 516, Fed. Bldg., 111 W. Huron St., Buffalo, NY on the 19th day of April, 1976 at 10: o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce

12a

Appendix "D"—IRS Summons.

obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 8th day of April, 1976.

DENNIS J. HERZOG	Special Agent
Signature	Title
Dennis J. Herzog	Tel: 842-3418

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603 Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date April 8, 1976

Time 10:08 AM

How Summons Was Served

☒ I handed an attested copy of the summons to the person to who it was directed, Charles Hall, as president of Asphalt Materials Corp.

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed

Signature	DENNIS J. HERZOG
Title	Special Agent

13a

Appendix "D"—IRS Summons.

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to who it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

APPENDIX "E"**Order to Show Cause and Petition**

IN THE UNITED STATES DISTRICT COURT

For the Western District of New York

UNITED STATES OF AMERICA and DENNIS J. HERZOG,
Special Agent, Internal Revenue Service,
Petitioners,

v.

ASPHALT MATERIALS, INCORPORATED and
CHARLES HALL, President,
Respondents.

Misc. Civ. 76-87
Civil Action No.

Upon the petition, the exhibit attached thereto, the affidavit of Special Agent Dennis J. Herzog, Internal Revenue Service, and upon motion of Richard J. Arcara, United States Attorney for the Western District of New York, it is

ORDERED that Asphalt Materials, Incorporated, and Charles Hall, president, appear before the United States District Court for the Western District of New York, in that branch thereof presided over by the undersigned, on the 1st day of November 1976, at 9:00 am to show cause why they

Appendix "E"—Order to Show Cause and Petition.

should not be compelled to obey the Internal Revenue Service summons served upon them on April 8, 1976. It is further

ORDERED that a copy of this order, together with the petition and exhibit thereto, be served personally upon Asphalt Materials, Inc., and Charles Hall, president, on or before October 22nd, 1976. It is further

ORDERED that the respondents, Asphalt Materials, Inc., and Charles Hall, president, shall file a written response to the petition within five (5) days after service of the petition upon them.

Dated at Buffalo, New York, this 14th day of October, 1976.

JOHN T. ELFVIN,
United States District Judge.

Appendix "E"—Order to Show Cause and Petition.

IN THE UNITED STATES DISTRICT COURT

For the Western District of New York

UNITED STATES OF AMERICA and DENNIS J. HERZOG,
Special Agent, Internal Revenue Service,
Petitioners,

v.

ASPHALT MATERIALS, INCORPORATED and
CHARLES HALL, President,
Respondents.

Civil Action No. ...

*PETITION TO ENFORCE INTERNAL REVENUE
SERVICE SUMMONS*

Now come the United States of America and Special Agent Dennis J. Herzog, Internal Revenue Service, by their attorney, Richard J. Arcara, United States Attorney for the Western District of New York, and show unto this Court follows:

I

This is a proceeding brought under the authority of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §§7402(b) and 7604(a), to judicially enforce an Internal Revenue Service summons.

Appendix "E"—Order to Show Cause and Petition.

II

The petitioner, Dennis J. Herzog, is a special agent of the Internal Revenue Service employed in Buffalo, New York, and is authorized to utilize Internal Revenue Service summonses issued under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. §7602, and Treasury Regulation §301.7602-1, 26 C.F.R. §301.7602-1.

III

The respondent, Asphalt Materials, Incorporated, is a New York corporation with offices at 141 Fillmore Avenue, Buffalo, New York, within the jurisdiction of this Court. The respondent, Charles Hall, is president and majority shareholder of the respondent, Asphalt Materials, Inc., also with offices at 141 Fillmore Avenue, Buffalo, New York.

IV

The petitioner, Special Agent Dennis J. Herzog, is conducting an investigation of the federal income tax liabilities of the respondent, Charles Hall, for the calendar years 1972, 1973 and 1974.

V

The respondent, Asphalt Materials, Inc., and Charles Hall, president, have books, records, papers and information all of which relate to the tax liabilities under investigation by the petitioner, Special Agent Dennis J. Herzog.

VI

On April 8, 1976, a summons was issued by the petitioner, Special Agent Dennis J. Herzog, directing the respondents, Asphalt Materials, Inc., and Charles Hall, president, to ap-

Appendix "E"—Order to Show Cause and Petition.

pear before the petitioner, Special Agent Dennis J. Herzog, on April 19, 1976 at 10 a.m. to testify and to produce for examination certain corporate books, records and papers, all as set forth in the attached affidavit and summons. An attested copy of the summons was served upon the respondents, Asphalt Materials, Inc., and Charles Hall, president, by the petitioner, Special Agent Dennis J. Herzog, on April 8, 1976, by handing it to Charles Hall. The summons issued to the respondents, Asphalt Materials, Inc., and Charles Hall, president, is attached hereto and incorporated herein as Exhibit 1.

VII

The respondents, Asphalt Materials, Inc., and Charles Hall, president, failed to appear in response to the summons issued to them or to testify or produce the corporate books, records and papers as required by the summons and such failure continues to the date of this petition.

VIII.

The testimony and corporate books, records and papers sought by the summons issued to the respondents, Asphalt Materials, Inc., and Charles Hall, president, are not already in the possession of the Internal Revenue Service and no recommendation for prosecution of the taxpayer has been made to the United States Department of Justice.

IX

It was and now is essential to the determination of the tax liabilities of the taxpayer, Charles Hall, for the calendar years 1972, 1973 and 1974 that Asphalt Materials, Inc., and Charles Hall, president, be required to provide testimony and produce the records demanded, as is evidenced by the af-

Appendix "E"—Order to Show Cause and Petition.

fidavit of the petitioner, Special Agent Dennis J. Herzog, attached hereto and incorporated herein as part of this application.

WHEREFORE, the petitioners respectfully pray:

1. That this Court enter an order directing the respondents, Asphalt Materials, Inc., and Charles Hall, president, to show cause, if any they have, why they should not comply with and obey the aforementioned summons in each and every requirement thereof.
2. That the Court enter an order directing the respondents, Asphalt Materials, Inc., and Charles Hall, president, to obey the aforementioned summons and each and every requirement thereof, and ordering their attendance and testimony and the production of the books, records and papers as required and called for by the terms of the summons, before Special Agent Dennis J. Herzog, or any other proper officer of the Internal Revenue Service, at such time and place as may hereafter be fixed by Special Agent Dennis J. Herzog, or any proper officer of the internal Revenue Service.
3. That the United States recover its costs in maintaining this action.
4. That the Court render such other and further relief as is just and proper.

DATED: Buffalo, New York, October 14, 1976.

RICHARD J. ARCARA,
United States Attorney,
By: RICHARD E. MELLENGER,
Richard E. Mellenger,
Assistant United States Attorney.

APPENDIX "F"**Handbook for Special Agents**

267.2

Purpose of Examination

(1) A summons may be issued for the purpose of examining books and records of taxpayers and third parties and obtaining testimony under oath that may be relevant or material in:

- (a) Ascertaining the correctness of any return.
- (b) Making a return where none has been made,
- (c) Determining a tax liability, or
- (d) Collecting such liability.²

(5) The purpose of a summons is not limited to obtaining records for what the Government already knows, therefore the Government is permitted to indulge in some "fishing."⁶ The inquiry cannot amount to an inquisition or arbitrary inquiry on the part of the tax investigators. A reasonable basis for making the inquiry must exist. What is justifiable "fishing" will be determined from all the facts in each case including the end for which the information is sought. The investigation must not be an unreasonable burden on the third party whose records are sought.⁷

268.3

Use of Affidavits in Summons Proceedings

(1) To support applications for court orders directing compliance with a summons, the agent may be requested by

Appendix "F"—Handbook for Special Agents.

the United States Attorney to prepare an affidavit (Exhibit 200—15 contains a sample) reciting detailed information concerning the nature and purpose of the examination, the testimony and records desired, and their relevancy to the examination. Usually, enforcement proceedings are held solely upon affidavits (of the agents and possibly the person summoned) and oral argument. Accordingly, it is highly important that the affidavits clearly show that the person summoned has possession, care, or custody of the desired records, and that they are material and relevant to the tax liability of the person being investigated.¹⁵ If the summons pertains to a year previously examined, a copy of the District Director's reopening letter should be attached.

APPENDIX "G"

Excerpts From Minutes of Enforcement Proceeding

Mr. Fronk:

Your Honor, Mr. Hall isn't only an employee, he is the president and sole shareholder of a closed corporation. If you read through the summons, all the records which have been subpoenaed, and properly subpoenaed under the section, are relevant obviously to a criminal investigation against Mr. Hall and/or the corporation, and the cases are legion, and Mr. Dougherty well knows the cases are legion. There could hardly be any more relevant and material inquiry when you seek to build a criminal tax case against a president of a company than their sales journals, disbursement journals and corporate records. There is no Fifth Amendment privilege, and Mr. Dougherty has tried to raise that and he hasn't brought it forth at this time, for corporate records to be produced in this case. Your Honor, we can cite cases which show that, as far as the relevance of this investigation, we cite the United States versus Giordano, 419 Fed. 2nd 564, cert. denied. There are dozens of cases showing that an inquiry like this on its face is overwhelmingly relevant to any possible tax liability on behalf of the

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